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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	WT DOCKET NO. 94-147
	)	
	)	
Licensee of 152 Part 90 Stations in the	)	
Los Angeles, California Area	)	

To: Honorable Richard L. Sippel
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S MOTION TO ENLARGE ISSUES

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to Section 1.229(b)(3) of the Commission's Rules, now requests that the following issues be specified against James A. Kay, Jr. (Kay):

> To determine, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.
>
> To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in the "Motion to Enlarge, Change, or Delete Issues" filed by Kay on January 12, 1995 and January 25, 1995.
>
> To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in his June 2, 1994 response to a Commission letter of inquiry.

With respect to the issue relating to the unauthorized transfer of control, the Bureau believes there is no need to relitigate matters which were decided in the Sobel proceeding. Kay was a

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party to the Sobel proceeding. He received full notice that his involvement in Sobel's stations was at issue, and he had a full and fair opportunity to litigate the question of whether he was a party to an unauthorized transfer of control in that proceeding. With respect to the requested misrepresentation/lack of candor issues, while those precise issues were not tried in the Sobel proceeding, the Bureau contemplates that its proof under these issues would consist of documents and testimony in evidence in the Sobel proceeding. Accordingly, the Bureau believes the addition of the requested issue would not delay or materially lengthen the hearing.

2. In the Memorandum Opinion and Order, FCC 97M-201 (issued December 5, 1997), the Presiding Judge stated:

> issues of the credibility of Marc Sobel and the credibility, candor, or misrepresentation of James A. Kay, Jr. ARE SET with respect to the preparation and/or use by James A. Kay, Jr. of the Affidavit of Marc Sobel and/or the Affidavit of James A. Kay, Jr. in connection with a Motion to Enlarge, Change or Delete Issues that was filed in this case by James A.Kay, Jr. on or about January 25, 1995.

The Bureau agrees with the Presiding Judge that the Initial Decision, FCC 97D-13 (released November 28, 1997) (I.D.) (submitted as Attachment 1 to this motion) necessarily raises serious questions about Kay's qualifications to be a Commission licensee. In this petition, the Bureau is asking the Presiding Judge to add an issue that would require consideration of Kay's participation in an unauthorized transfer of control on his character qualifications to be a Commission licensee. The Bureau has framed specific misrepresentation/lack of candor issues in order to ensure that Kay has full, fair, complete and explicit notice as to the scope of the issues specified against him.

Procedural Matters

3. This motion is timely because it is being filed prior to the January 9 deadline for petitions to enlarge issues set by the Presiding Judge in his Memorandum Opinion and Order, FCC 97M-201, supra. The Bureau is filing its petition prior to the January 9 deadline because the exact scope of the issues added by the Presiding Judge could determine whether the Bureau requires any additional discovery on the issues.

4. The factual allegations in this petition comply with Section 1.229(d) of the Commission's Rules because they are contained in a decision which may be officially noticed and a letter which Kay declared to be true under penalty of perjury.

Background

5. On February 12, 1997, the Commission instituted a revocation proceeding against Marc Sobel. Marc Sobel, 12 FCC Rcd 3298 (1997). The designation order specified the following issues against Sobel:

> (a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations **to James A. Kay, Jr.** (emphasis added);
>
> (b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

> (c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.
>
> (d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

Kay sought to intervene in the Sobel proceeding and was made a party for all purposes. Memorandum Opinion and Order in WT Docket No. 97-56, FCC 97M-43 (released March 24, 1997) (ALJ Frysiak). Judge Frysiak, pursuant to a motion to enlarge issues filed by the Bureau, then added the following issues:

> (a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.
>
> (b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

Memorandum Opinion and Order, FCC 97M-82 (released May 8, 1997). Judge Frysiak added those issues based upon two affidavits submitted in this proceeding in which Sobel attested that "Mr. Kay has no interest in any radio station or license of which I am the licensee." Kay had adopted the same statement in his "Motion to Enlarge, Change or Delete Issues." That pleading was filed on January 12, 1995 and again on January 25, 1995. The hearing in the Sobel case was held on July 29 and 30, 1997.

The Sobel Decision

6. On November 28, 1997, Judge Frysiak released the I.D. holding that Sobel is not qualified to be a Commission licensee. Judge Frysiak concluded with respect to the stations licensed to Sobel but managed by Kay that:

> In light of all the foregoing and on the record taken in its entirety, it is abundantly clear that Kay has the ultimate control of Sobel's Management Agreement stations." I.D., ¶68.

With respect to the misrepresentation/lack of candor issue, the Presiding Judge concluded as follows:

> The findings establish, and it is concluded that Sobel intended to mislead and deceive the Commission with respect to Kay's actual role in the affairs of Sobel's 800 MHz stations. There is no doubt that if Sobel had wanted the Commission to know about Kay's true activities regarding Sobel's stations, a clear statement to that effect would have been submitted and the Commission would have known in no uncertain terms exactly what Kay was doing. The fact that no such statement was submitted until the Commission requested the Management Agreement indicates that Sobel had no intention of disclosing those activities to the Commission.

I.D., ¶77. Based upon those conclusions, Judge Frysiak concluded that "Sobel cannot be relied upon in the future to have the essential character traits of truthfulness and reliability" and revoked all of Sobel's licenses. Id.

7. The Sobel I.D. raises very serious questions in this proceeding about Kay's qualifications to be a Commission licensee. The decision explicitly determined that Kay had violated Section 310(d) of the Communications Act of 1934, as amended, by holding ultimate control of stations licensed to Sobel. Furthermore, the findings and conclusions in the decision provide compelling evidence that Kay as well as Sobel misrepresented facts and lacked candor with the Commission. The primary misrepresentation that the Presiding Judge found to have been made was the statement by Sobel that "Mr. Kay has no interest in any radio station or license of which I am the licensee." In fact, Kay made and verified the very same statement in the same pleadings to which he attached the Sobel affidavits. See I.D., ¶51 ("Kay has no interest in any of the licenses or stations held by Marc Sobel.") Moreover, Kay had personal knowledge of each of the facts the Presiding Judge relied upon in concluding that Sobel misrepresented facts or lacked candor. See I.D., ¶¶52, 59, 61, 71-72. Indeed, virtually all of those facts either concern Kay's own actions or the nature of Kay's relationship with Sobel. Since Kay made the same statement which was found to be a misrepresentation by Sobel, and since Kay had knowledge of the facts which the Presiding Judge concluded made the statement a misrepresentation, the Bureau believes that the Sobel record contains compelling evidence that Kay misrepresented the same facts to the Commission.

8. Moreover, Kay's own testimony establishes that he knew that he was making a misrepresentation to the Commission when he claimed that he had no interest in any of

Sobel's stations. Kay presented the affidavit to Sobel for Sobel's signature. I.D., ¶50. The Presiding Judge found:

> 58. Sobel testified that when he signed the affidavit, he thought about the word 'interest' 'because it was the only thing in here' that 'might have been questionable . . ." Tr. 156. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word 'interest.' Tr. 371. Kay told him to the best of his knowledge, as it had been explained to him:
>
> > It referred to ownership as in a partnership or ownership of stock, as having a direct financial stake in something. Being an owner or a stockholder or direct party to something.
>
> Id. Sobel testified that Kay has a direct financial stake in the Management Agreement stations. Tr. 150. He testified that he does not think Kay told him that a direct financial stake is an interest in a business. Id. Kay denied having a financial stake in the licenses, but he admitted that with respect to the stations, he owned the equipment and that he obtains the revenues from the stations. Tr. 372.

Kay thus admitted at the Sobel hearing that he had a direct financial stake in the stations. In this proceeding, however, he denied that he had such a financial stake. The two statements are facially inconsistent and raise very serious questions as to whether Kay misrepresented facts or lacked candor.

9. Moreover, Judge Frysiak's findings and conclusions raise a substantial and material question of fact as to whether Kay misrepresented facts or lacked candor in his June 2, 1994 response to the Commission. In that letter (submitted as Attachment 2 to this petition), Kay declared under penalty of perjury that the following statements were correct:

> 1) In response to Item one of your letter dated January 31, 1994, Mr. Kay states that he holds radio station license in his own name, as an individual. Mr. Kay owns an interest in two closely-held corporations, namely, Buddy Corp. and Oat Trunking Group, Inc. Each of those corporations holds a small number of licenses. However, the Commission's requirements for construction and loading of the stations authorized to the two corporations do not affect Mr. Kay's eligibility to hold any other license. Mr. Kay states that he does not operate any station of which either he or the two above named corporations is not the licensee.

While Kay did not have a written management agreement with Sobel at the time those statements were made, Kay had agreed to "provide the equipment and money needed to construct and to operate Sobel's 800 MHz repeater stations, manage and market those stations, and pay all the operating expenses." I.D., ¶13. Given Judge Frysiak's findings concerning how Kay controlled Sobel's stations, it is clear that Kay was operating Sobel's stations, and Kay's statement to the contrary was therefore false. Since Kay knew that he was deeply involved in operating Sobel's stations, a substantial and material question of fact exists as to whether Kay misrepresented facts or lacked candor in his June 2, 1994 response to the Commission where he denied such involvement.

10. With respect to the unauthorized transfer of control, Kay has no right to relitigate the findings and conclusions reached in the Sobel proceeding. He voluntarily intervened as a party in that proceeding, and he had a full and fair opportunity to litigate those findings and conclusions in the Sobel proceeding. Indeed, he currently has a full and fair opportunity to

appeal the I.D. in the Sobel proceeding.[1] Allowing Kay to relitigate the same findings and conclusions in the instant proceeding would simply be a waste of the Commission's scarce resources, is not required to protect Kay's due process rights, and would serve no purpose. If the instant motion is granted, Kay would have the opportunity to offer argument as to why the findings and conclusions concerning unauthorized transfer of control do not impact upon Kay's qualifications to be a Commission licensee, and he could also have the opportunity to offer evidence in mitigation (although evidence challenging the findings and conclusions in the Sobel proceeding would not be proper mitigation evidence).[2]

11. With respect to the misrepresentation issues, collateral estoppel is not strictly applicable because the issue designated in the Sobel proceeding inquired whether Sobel, not Kay, misrepresented facts or lacked candor. The Bureau contemplates that virtually all of its proof under the proposed issues would consist of the documents and testimony in the record in the Sobel proceeding.

[1] The Bureau anticipates that Sobel and Kay will appeal the I.D. To the extent the Commission modifies the I.D., that modification would have to be taken into account in this proceeding.

[2] To the extent Kay offered mitigating evidence, the Bureau would have the right to examine that mitigating evidence and offer its own evidence to show that mitigation was not warranted.

12. Accordingly, the Bureau asks the Presiding Judge to specify the issues stated above.

Respectfully submitted,
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Chief, Wireless Telecommunications Bureau

Gary P. Schonman
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December 30, 1997

ATTACHMENT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 97-56
	)	
MARC SOBEL	)	
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences	)	
	)	
MARC SOBEL and MARC SOBEL d/b/a AIR WAVE COMMUNICATIONS	)	
	)	
Licensees of Certain Part 90 Stations in the Los Angeles Area	)	
	)	

APPEARANCES

Robert J. Keller, Esq. and Scott A. Fenske, Esq. on behalf of Marc Sobel; and John J. Schauble, Esq. and William H. Knowles-Kellett, Esq. on behalf of the Wireless Telecommunications Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: November 24, 1997 ; Released: November 28, 1997

Preliminary Statement

1. By Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 12 FCC Rcd 3298 (1997) (HDO), the Commission instituted a revocation proceeding against the following licenses held in the name of Marc D. Sobel (Sobel): KAC8275 (GMRS), KD53189 (Business), KNBT299 (Conventional SMR), KRU576 (Conventional SMR), WIH718 (Business). WIJ516 (Business), WIJ698 (Business), WIJ716 (Business), WIK548 (Business), WIK657(Business), WIK833 (Business), WIL516 (Business), WIL598 (Business), WNPX844 (Business), WNPY680 (Conventional SMR). WNWB334 (Conventional SMR), WNXL471 (Conventional SMR), WNYR424 (Conventional SMR). WNZC764 (Business), WNZJ445 (Business), WNZS492 (Conventional SMR), WPAD685 (Conventional SMR), WPCA891 (Conventional SMR), WPCZ354 (Conventional SMR), WPDB603

(Conventional SMR), WPFF529 (Conventional SMR),WPFH460 (Conventional SMR), and WPCG780 (Conventional SMR). The Commission also designated for hearing the following pending applications filed by Sobel:

File No.	Date File	Call Sign	Frequency	Service	Type
670861	6/9/94	KKT934	851.8875	Conventional SMR	Assignment
415367	4/18/94	______	507.2875	Business	New
697577	3/22/95	WPAD695	852.1625 852.4125	Trunked SMR	Modification
416021	7/31/95	______	472.4125	Business	New
154618	5/16/95	______	463.6750	Business	New
501542	4/17/95	WPCZ354	853.1375	Conventional SMR	Reinstate
666673	5/6/94	WNWB334	854.0375	Conventional SMR	Modification
415478	9/16/94	______	471.9375	Business	New
614567	11/13/92	WNZS492	854.0875	Conventional SMR	Modification
R28310	12/15/94	WIJ716	471.8375 474.8375	Business	Renewal
R28311	12/15/94	KD53189	465.7375 468.7375 468.6125 463.4875 463.6125 468.5375 463.5375	Business	Renewal
D024171	2/20/96	WIK833	471.5125 474.5125	Business	Assignment
	1/24/96	WIK833	471.5125 474.5125	Business	Renewal

The Commission also held in abeyance five finder's preference requests filed by Sobel.

2. The Commission designated the following issues for resolution in this proceeding:

(a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.

(d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

3. The HDO placed the burden of the introduction of evidence and the burden of proof on the Wireless Telecommunications Bureau (WTB) with respect to issues (a), (b), and (d). The burden of the introduction of evidence and the burden of proof on issue (c) was placed with Sobel. The HDO also directed the Presiding Judge to determine whether a forfeiture should be issued against Sobel for willful and repeated violations of §310(d) of the Communications Act.

4. By Memorandum Opinion and Order, FCC 97M-43 (released March 24, 1997), the Presiding Judge granted the "Petition to Intervene" filed by James A. Kay, Jr. (Kay) and named Kay a party to the proceeding.

5. By Memorandum Opinion and Order, FCC 97M-82 (released May 8, 1997), the Presiding Judge added the following issues against Sobel:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

(b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

The burdens of proceeding and of proof under those issues were placed on the WTB.

6. Hearings on all the issues were held in Washington, D.C. on July 29 and 30, 1997. The record in this proceeding was closed on July 30, 1997. Tr. 377. Proposed findings were filed by the WTB and Sobel on September 25, 1997. Replies were filed on October 21, 1997 by all the parties hereto.

Findings of Fact

A. Transfer of Control Issue

Sobel's Relationship with Kay

7. Sobel has been involved in the land mobile radio business in the Los Angeles area for approximately 20 years. In that capacity he operates and maintains UHF (450 MHz and 470-512 MHz) repeaters on which he sells service to various business users; installs, maintains, and repairs repeaters and radio systems for other land mobile radio licensees; and provides consulting services on the design and operation of such radio systems. He is also an authorized mobile radio equipment dealer for several vendors, selling and leasing mobile radio equipment to repeater licensees and end users.

8. James A. Kay, Jr. (Kay) began operating a radio/television repair service in 1972 or 1973. Tr. 325. He started providing repeater service on a commercial basis in the early 1980s. Id. Kay holds approximately 152 licenses from the FCC, of which approximately 50 licenses are in the 800 MHz band. Tr. 329-330. He has approximately seventy-five repeaters in the 800 MHz band that are licensed to him, and he also manages around 25 to 30 additional 800 MHz repeaters that are licensed to other entities. Tr. 330. Kay does business under the name Lucky's Two-Way Radios, which provides repeater service and does some site rental business. Tr. 333-334. Kay is the sole stockholder and president of Buddy Corp., which does business under the fictitious business name of Southland Communications. Tr. 334. Southland provides sales, service, and installation of two-way radios. Id.

9. Sobel has known Kay for about 20 years. Tr. 71, 326. They first met when Sobel was working at Sandy's Electronics and Kay was a customer there. Id. Kay and Sobel were both active in Citizens Band radios in the 1970s (Tr. 326), and they have been friends since the 1970s. Tr. 71, 326-327. They have repaired equipment, shared leases, and helped each other for more

than a decade. Tr. 327. Since the mid-to-late 1980s, Sobel has installed, maintained and serviced Kay's repeaters as a contractor paid by Kay. Tr. 72, 106, 327. Sobel repairs and maintains approximately 350 stations that Kay currently owns or manages. Tr. 105. Sobel has had the first call to repair, maintain, and install Kay's stations (Tr. 105), except for three sites where another contractor is located much closer to the sites than Sobel. Tr. 105, 328. Kay generally turns to Sobel when there is a difficult and complicated technical problem that Kay will not handle himself. Tr. 328. Kay will also ask Sobel to contact a potential customer to solve a troubling problem that Kay's regular staff is unable to solve. Tr. 327. Sobel might perform that service as often as twice a month. Tr. 72, 328. On occasion, Sobel will also contact someone on Kay's behalf to determine whether they are still operating a station. Tr. 72. If they were not operating, Sobel will help Kay get the license cancelled. Id. If the licensee was operating, Sobel would attempt to convince the licensee to change over to Mr. Kay's system. Tr. 72-73.

10. During the period October 1990 to April 1997 Sobel billed Kay for approximately 3,360 hours of work that he performed for Kay. Kay receives the lowest rate Sobel charges because of the large amount of work Sobel performs for Kay. WTB Ex. 25, Tr. 245-246.

Agreement Regarding Sobel's 800 MHz Repeaters

Background

11. In the early 1990s, Sobel became interested in holding 800 MHz licenses himself. Tr. 73. Sobel asked Kay if he would help Sobel get involved in 800 MHz licenses. Id. Sobel approached Kay for assistance because he knew Kay had 800 MHz stations that were making money. Tr. 183-184. Kay agreed to help. Tr. 73. While Sobel believes he could have prepared the applications himself, he relied on Kay to prepare the applications because Kay had the software and additional knowledge needed to prepare the applications, and because it was more convenient to have Kay prepare the applications. Tr. 184.

12. Around the time the first 800 MHz station in Sobel's name was being constructed in the early 1990s, Sobel and Kay reached an oral agreement under which Kay would provide the equipment and money needed to construct and to operate Sobel's 800 MHz repeater stations, manage and market those stations, and pay all the operating expenses. Tr. 103-104. In return, Kay would receive the first \$600 of revenue each month from each station, and the revenue over and above that would be split equally between Kay and Sobel. Tr. 104. Sobel did not have the disposable funds to invest in 800 MHz at the time he obtained the licenses. Tr. 187. Sobel did not have the option of going into 800 MHz on his own. Id. Sobel estimated that it would cost \$500 to \$600 a month to lease a repeater site and the equipment needed for the repeater, install, maintain and repair the equipment, and obtain insurance. Tr. 104.

13. Under the oral agreement. Sobel was to be the person responsible for maintaining, repairing, and installing Sobel's 800 MHz stations. Id. Sobel performed most of the actual construction and installation. Tr. 107. Sobel performed that work as a contractor for Kay, and he was paid an hourly fee by Kay for that work. Tr. 106-108. Sobel cannot distinguish based upon his invoices what work he has done on Sobel's 800 MHz stations and what work relates to Kay's stations. Tr. 116, 243. Kay selected and purchased the equipment needed to construct the stations. Tr. 107, 351, 353. Kay did not keep track of which equipment went to stations licensed to him and which equipment went to Sobel's 800 MHz stations (or other stations he managed). Tr. 354.

14. At some point between the time Kay and Sobel entered into their original oral agreement and the time they entered into a written management agreement, they orally agreed that Kay would have an option to purchase Sobel's 800 MHz stations for $500 each. Tr. 108. Kay asked for the option because he needed to protect himself since his customers were on Sobel's stations. Tr. 365-366.

15. At some point in late September or October 1994, in response to a Freedom of Information Act (FOIA) request, Kay received a draft hearing designation order relating to his qualifications to be a Commission licensee. Tr. 261. Kay informed Sobel that the draft order contained the following language (or substantially similar language):[1] "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions. We believe these names include . . . AirWave Communications and Marc Sobel, d/b/a AirWave Communications." Tr. 259, 262.

16. Based on the language in the draft hearing designation order, and because of Kay's problems with the FCC and his knowledge that parties had complained about the relationship between Sobel and Kay, Sobel asked Kay to have their oral agreement reduced to writing. Tr. 108-109, 262. On October 28, 1994, Kay and Sobel executed a "Radio System Management and Marketing Agreement." WTB Ex. 38, Tr. 108. The agreement was prepared by Brown & Schwaninger, a law firm representing both Kay and Sobel. Tr. 109.

17. Under Paragraph VII A. of the management agreement, Kay was required to pay Sobel an option fee of $100 as consideration for the option to purchase Sobel's 800 MHz stations. WTB Ex. 38, P. 4, Tr. 111. Kay initially forgot to pay the option fee. Tr. 111. In addition, the agreement had some clerical errors, and some stations were omitted from the agreement. Tr. 110-111. Kay and Sobel entered into a new written agreement to allow Kay to pay the $100, thus making the option binding, and to make the corrections to the agreement. Id. WTB Exs. 39 and 40, which are the December 30, 1994 agreement and an addendum, constitute the written

[1] The quoted language is from the actual order designating Kay's licenses for hearing. Tr. 258-259.

agreement between Kay and Sobel concerning Sobel's 800 MHz Repeater stations. Tr. 112. There are no other written agreements between Kay and Sobel concerning Sobel's 800 MHz stations (hereinafter referred as the "Management Agreement Stations"). Tr. 361.

18. The agreement is effective for ten years. WTB Ex. 39, P. 6. The agreement automatically renews for five consecutive ten year periods unless Kay alone gives notice to the contrary at least ninety days prior to the end of the term. Id. Sobel has no right to prevent the agreement from automatically renewing. Id.

19. Paragraph III of the Management Agreement provides:

> Agent [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities, employing Agent's reasonable best efforts. Agent may either supply required labor and equipment and labor directly or may supply required equipment and labor through arrangements with other firms on behalf of Agent.

WTB Ex. 39, P. 3. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Tr. 107, 351, 353. Paragraph IV of the agreement provides that all equipment provided by Kay shall remain his sole and exclusive property. WTB Ex. 39, P. 3. The equipment was "leased" to Sobel for a term coterminous with the agreement, but Sobel was given no title, interest, or control over the equipment, except to the extent he was granted permission to use Kay's equipment. Id.

20. As discussed below in greater detail, Sobel currently works on maintaining and repairing the Management Agreement stations. Tr. 112. Nothing in the management agreement provides that Sobel will be the person who maintains and repairs the stations. Tr. 113, 359-360. Paragraph XX of the management agreement provides that the agreement "is the entire agreement between the Parties with respect to the subject matter thereof, making void all previous negotiations and agreements . . ." WTB Ex. 39, P. 8. Sobel testified that it was not necessary to have a provision in the agreement stating that he would maintain and repair the facilities because he was already performing that work. Tr. 113. Kay testified that it was a "basic assumption" that Sobel would be performing the work. Tr. 360.

21. Most of the Management Agreement stations and Kay's stations are located high on mountaintops. Tr. 118. Generally, Sobel must drive through locked security gates to get to the sites. Id. The buildings at the sites, as well as the cabinets containing the equipment, are often locked. Id. For both the Management Agreement stations and the Kay stations, Sobel has in his personal possession the keys he needs to access the sites and the equipment. Id. Generally, the

control points for the Management Agreement stations are located at Sobel's home office, Sobel's car, and Kay's office. Tr. 118-119

Control Over Daily Operations

22. Paragraph I of the management agreement provides that Kay shall be the sole and exclusive agent for the sale of all services provided by the Management Agreement stations. WTB Ex. 39, P. 2, Tr. 119. Kay's duties include all administrative duties associated with marketing the stations, including, but not limited to, bookkeeping, billing and collections. WTB Ex. 39, P. 2. Kay is given the "sole and exclusive discretion" to negotiate and execute contracts with customers, and Sobel is relieved of any liability under those contracts. Id. Paragraph II of the management agreement appoints Kay as the "sole and exclusive Agent for the management of the Stations' transmitting facilities and associated business." Id. Kay's duties under this provision include "all management functions associated with the operation of the Stations, including but not limited to the invoicing of users, collection of payments from users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation." Id. Kay employs a staff to assist in these duties. Tr. 339, et seq. Kay has the sole and exclusive right to negotiate and execute any contracts entered into under Paragraph II of the Management Agreement, and Sobel has no liability under those contracts. WTB Ex. 39, P. 2.

23. When a customer receives service on one of the Management Agreement stations, the customer signs a contract which is also signed by Kay. Tr. 119. The Management Agreement stations have several hundred customers. Id. Sobel does not know the number of customers per month who have signed up to be on the Management Agreement stations in 1997. Tr. 122. Sobel recruits customers himself on his 450 MHz stations. Tr. 119. On occasion, Sobel will be approached by a customer who would be better placed on an 800 MHz system. Id. In that instance, Sobel will refer those customers either to Mr. Kay's stations or one of the Management Agreement stations. Tr. 119-120. He has not placed more than a handful of customers on the Management Agreement stations. Tr. 120. Kay and Sobel refer customers to one another, and they both receive referrals from and give referrals to other dealers. Tr. 318-319.

24. Kay's employees deal with the customers. Tr. 343. Kay's salespeople sell radios. Tr. 344. The salespeople do not know whether they are selling time on a repeater Kay owns, a repeater Kay manages, or a community repeater. Id. Some of Kay's customers are on Kay's stations, some customers are on just managed stations, and some customers are on both types of stations. Tr. 348-349. The important consideration in determining where a customer is placed is the needs of the customer. Tr. 344-345. Kay looks at factors such as where service is needed, how much air time is needed, when the air time is needed, and whether the customer is conventional or trunked. Tr. 345. Ownership of the repeaters is not an important factor in determining where to place a customer, and Kay does not prefer stations licensed to himself over

stations licensed to Sobel. Tr. 346. When a salesperson has made a sale, the salesperson will go to Barbara Ashaur, a Kay employee, and request that a code and frequency be assigned. Tr. 344. About half the time, the salesperson will make the initial recommendation as to where to place the customer. Tr. 345 Sometimes, Ms. Ashaur can take care of assigning the codes herself. Tr. 347. If Ms. Ashaur needs specific frequencies assigned or needs further assistance for some other reason, she will ask either Sobel or Kay for assistance, regardless of who owns the repeater in question. Id. Sobel assigns "an awful lot" of frequencies for Kay's stations. Id. Once the frequency and code are assigned, Ms. Ashaur generates a request to activate the customer's radio system. Id.

25. Only Sobel and Kay have the access codes needed to activate repeaters. Tr. 124. Kay's repeaters have computerized controllers, and each customer is assigned a specific code. Id. When the customer's code is activated, and the customer's radio transmits that tone, the repeater will repeat that customer's signal. Tr. 124-125. Sobel testified that he turns on "all" the codes for the Management Agreement stations, and he conducts the majority of the activations on Kay's stations. Tr. 123-124. Kay testified that Sobel performs slightly more than two-thirds of the activations for both the Management Agreement stations and Kay's stations. Tr. 347-348. When Sobel reviews frequency placement and activates customers on either the Management Agreement stations or Kay's stations, he is paid an hourly fee by Kay for that work. Tr. 125.

26. Kay and his employees bill customers and collect fees from customers for the Management Agreement stations. Tr. 120. A lot of customers (about 500 to 700) use both Kay stations and Management Agreement stations. Tr. 348-349. By and large, those customers receive one consolidated bill, unless the customer wishes to receive separate bills. Tr. 349. Kay or his employees perform the bookkeeping relating to the Management Agreement stations. Tr. 120. Kay or his employees make sure any obligations incurred with respect to the Management Agreement stations get paid. Id. Kay or his employees keep and maintain the financial records for the Management Agreement stations. Tr. 120-121, WTB Ex. 39, P. 6. Sobel reviews the revenue levels for the Management Agreement stations every few months or six months. Tr. 121-122. He obtains the information from Kay's computer. Tr. 121. Sobel has free access to Kay's office during business hours. Tr. 237.

27. Sobel can learn of the need to work on the Management Agreement stations either from Kay's office or by monitoring the stations himself. Tr. 116. Sobel monitors the Management Agreement stations possibly at least once a month. Tr. 117. Sobel monitors Kay's stations as often as he monitors his own stations. Id. Currently, Kay rarely monitors the stations, although he monitored the stations more regularly until a couple of years ago. Id. Some of Kay's employees also monitor the Management Agreement stations when a customer calls and says a station does not work. Id. While giving a time frame is difficult, Sobel estimates that he maintains or repairs Management Agreement stations as a whole several times a month. Tr. 114. Sobel cannot distinguish based upon his invoices what work he has done on the Management

Agreement stations and what work relates to Kay's stations. Tr. 116. It did not make any difference to Kay whether Sobel was working on a Management Agreement station or a station licensed to Kay. Tr. 243. Whenever Sobel performs work relating to a Management Agreement station, he is working as a contract technician for Kay, and Kay pays Sobel an hourly fee for that work. Tr. 106, 144.

28. Kay's technicians will check the repeaters and other equipment for stations Kay owns or manages. Tr. 341-343. A technician working on a repeater would have no reason to know who holds the license. Tr. 343. Similarly, a salesperson selling air time to a customer would have no reason to know whether the station the customer will be using is licensed to or managed by Kay. Tr. 344. By and large, none of Kay's employees performing work on a station would have any reason to know to whom the station is licensed. Tr. 340.

29. Sobel does not consider himself to be an absentee owner because he is involved in the operation of the stations on a day-to-day basis. Tr. 293-294. That involvement is as a contractor selected and paid by Kay. Tr. 144.

Preparation of Applications and Policy Decisions

30. Kay did the research needed to locate available frequencies for which Sobel could apply. Tr. 73. Kay would then tell Sobel of the frequency and review with Sobel information such as who else was on the channel, where the repeater would be located, and the need for the repeater. Tr. 73-74.

31. The Management Agreement stations are located at the following sites: Mount Lukens, Santiago Peak, Snow Peak, Hollywood Hills, Mount Wilson, Heaps Peak, and possibly Sunset Peak. Tr. 79-84.[2] Sobel uses the Hollywood Hills site for his 470 MHz stations, and he leases that site from Louella McNeal. Tr. 78. Sobel, in turn, subleases that property to Kay, who pays Sobel $7,000 to $8,000 a year in rent. Tr. 78, 250-251. For each of the other sites, Kay made the arrangements with the property owners to make sure the Management Agreement stations could operate from those sites, and he has leases with the property owners for those sites. Tr. 84-85. Under the management agreement, a transmitter site may be relocated on sixty days notice to Kay only if the relocation is in the best interests of both parties. WTB Ex. 39, P. 5.

32. Sobel initially testified that Kay prepared "most" of the Management Agreement applications. Tr. 74. He claimed that there were times when he prepared the applications personally, but he could not recall which applications he prepared. Id. The applications were

[2] Many of the sites listed on the licenses (WTB Exs. 2-18) are secondary sites which are not required to be constructed under the Commission's Rules. Tr. 80. In several cases, Sobel could not recall whether secondary sites listed on his licenses had been constructed. Tr. 80-83.

prepared using specialized software from Slattery Software that Kay had on his computer. Tr. 74-75. Kay had a template in his computer that showed the various locations and contained the technical information needed for the applications. Tr. 206. The majority of Sobel's applications contain handwritten information concerning emission designators. WTB Ex. 1, Pp. 5, 8, 10, 12, 14, 16, 19, 21, 24. In every case, the handwriting is that of Kay. Tr. 76-78. While Sobel believes he could have prepared the applications himself, he knew Kay had the software and additional knowledge needed to prepare the applications, and it was more convenient "that he did the applications for me." Tr. 184.

33. Item 37 on FCC Form 574 asks for the name of the individual who completed the application form. WTB Ex. 1. In some of the Management Agreement applications, Sobel is sometimes identified as the person who completed the form, while in other applications, Kay is listed as the preparer. Id. Kay and Sobel construed Item 37 as asking for the identity of the person who should be contacted if there is a question, rather than asking who actually prepared the application. Tr. 208. Sobel is thus sometimes listed as the preparer of applications which were in fact prepared by Kay.

34. In some services, the Commission requires a non-agency entity called a "frequency coordinator" to review a land mobile application before it is submitted to the Commission in order to ensure that the application complies with the Commission's technical regulations and to ensure that spectrum is available. Tr. 86. The National Association of Business and Educational Radio (NABER) was a frequency coordinator for the frequencies used by the Management Agreement stations. Id. NABER requires applicants to fill out a form asking for basic information. Id. When dealing with NABER, Kay filled out the forms, and Sobel then signed the forms. WTB Ex. 2, Tr. 86-87.

35. Sobel reviewed and signed each application for the Management Agreement stations. Tr. 75, 206-207. The only edits Sobel can remember making to the applications occurred a couple of times when Kay misspelled Sobel's name. Tr. 75.

36. Kay has prepared letters for submission to the Commission regarding the Management Agreement stations. Tr. 335. Ordinarily, when the Commission finds a problem with a land mobile application, it returns the application to the applicant with an application return notice. Tr. 234. The record contains three responses to application return notices involving Management Agreement Stations -- all three responses were prepared by Kay. WTB Exs. 19, 21, 23; Tr. 88, 92, 96, 335-336, 338, 339. Sobel received the application return notices and asked Kay to prepare responses. Tr. 228-229.

Clearing of Channels and Acquisition and Disposition of Licenses

37. Unlike other services, land mobile frequencies are often shared with different licensees on the same frequency in the same area (an encumbered channel). Tr. 193. Under certain circumstances, however, a licensee can get exclusive use of a channel in an area (a clear channel). Id. A clear channel has several advantages over an encumbered channel. With a clear channel, a licensee can operate in an enhanced mode, there is no need to monitor the frequency for other users, and clear channels are substantially more valuable than encumbered channels. Tr. 195. There are several actions that can be taken towards clearing channels. If a party finds that another licensee has not operated its station for a year, it can ask the Commission to cancel the license and, in some cases, give the party the first opportunity to apply for the cancelled license. Tr. 196-197. If a co-channel station is operating, the licensee can attempt to persuade the co-channel licensee to cancel or to assign its license in return for new equipment or for favorable rates on repeater service on the licensee's repeaters. Tr. 197-198.

38. All of the initial applications for the Management Agreement stations were for encumbered channels. Tr. 198-199. Sobel claims that he did not have the time or the money to do the work needed to clear the channels himself. Tr. 199. Kay and Sobel therefore agreed that Kay would do the work and spend the money needed to clear the channels used by the Management Agreement stations. Id. Sobel knew Kay had been successful in this activity in the past, and he believed Kay had the knowledge and staff needed to do this work. Id. Sobel works from 30 to 60 hours a week. Id. As a contractor, he has assisted Kay in doing the work needed to clear Kay's channels. Tr. 72-73.

39. The licenses for stations KNBT299, WNYR424, and WNPY680 were obtained through assignment. Tr. 101. Sobel paid nothing for those licenses, and he does not know whether money was paid for those licenses (or any of the other details on the assignments). Tr. 102.

40. Under Paragraph VII of the management agreement, Kay has the exclusive option to purchase any of the Management Agreement stations at any time for $500 each. WTB Ex. 39, P. 4. The sale includes not only the license and the station assets but also any business created by operation of the station. WTB Ex. 39, P. 5. Paragraph VII E. requires Sobel to "maintain exclusive ownership and control of the license for the Stations" until and unless the licenses are assigned to Kay. Id. Therefore, Sobel cannot sell any of the Management Agreement stations without Kay's permission. Tr. 125-126. In contrast, if Kay wished to sell any of the Management Agreement stations, he could exercise his option to purchase the station and then direct Sobel to assign the station to Kay's designee, even if Sobel objected.

41. There are three stations subject to the Management Agreement that have been sold. Tr. 126. One station was sold to William Matson for between $70,000 and $100,000. Tr. 126, 366. Kay arranged for the sale of that station. Tr. 366. Sobel received $20,500 from that sale, and Kay received the balance of the money. Tr. 126-127, 366-367. Part of Kay's consideration

for receiving the majority of the sales proceeds was expenses he incurred in clearing the channel. Tr. 127, 373. Sobel asked Kay for $20,000, and Kay agreed. Tr. 374. With respect to the second station that was sold, Sobel only received $500; Sobel does not know how much money the second station was sold for. Tr. 127-128. The third station was sold as part of a trade, so no money was exchanged. Tr. 127. The exchange appears to be part of Kay's work in clearing the Management Agreement channels because Sobel received a cancellation of a license on another frequency, which increased the value of one of his licenses. Tr. 128. Sobel convinced Kay not to accept a $1.5 million offer for the Management Agreement Stations. Tr. 275. Sobel believed that the Management Agreement station could generate enough profit to make the investment lucrative. Tr. 267-268.

Setting of Prices

42. Paragraph I of the management agreement gives Kay the sole right to negotiate contracts with customers. WTB Ex. 39, P. 2, Tr. 128. The standard rate charged to customers of both the Management Agreement stations and Kay's stations is twelve dollars a month for each mobile transmitter. Tr. 129. Kay charges the same rate for use of the 800 MHz stations licensed in his name. Id. Since Kay's salespeople do not know whether they are selling time on a station owned by Kay or a station managed by Kay (Tr. 344), it follows that the rates for both types of stations would always be the same unless there were special negotiations. The last change in the standard rate was approximately three or four years ago. Tr. 129-130. Sobel does not recall whose idea it was to make that change. Tr. 130. At times, discounts are negotiated with the larger customers. Tr. 129. According to Sobel, Kay or his employees do the majority of the negotiating with customers, but he also does some negotiating wih customers. Id. Sobel only discusses rates with Kay or his employees a handful of times a year, if that. Id. Sobel also handles special problems involving Kay's customers. Tr. 72.

Retention of Counsel

43. Brown & Schwaninger became Sobel's FCC attorneys in the early-to-mid 1990s. Tr. 109. Kay introduced Sobel to that firm, which also represented Kay. Tr. 109, 370-371. Brown & Schwaninger represented both parties when they were preparing the management agreement. Tr. 109-110. Robert Keller, who also represents Kay in certain FCC matters, is currently Sobel's FCC counsel. Tr. 110. Sobel asked Kay whom he could use instead of Brown & Schwaninger, and Kay directed him to Mr. Keller. Id. Kay has paid all of Sobel's legal fees with respect to the Management Agreement stations, including the legal fees in connection with this hearing. Tr. 109, 112.

Control Over Personnel

44. Sobel has no employees. Tr. 130. Sobel is not sure if he has ever hired a contractor to do work relating to the Management Agreement stations. Id. The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay. Id.

45. As noted above, Kay's salespeople sell time on the Management Agreement stations as well as other stations Kay owns or manages. Tr. 344-345. The employees of Kay described below perform their duties with respect to the Management Agreement stations as well as other stations Kay owns or manages. Tr. 340, 342-343. Ms. Ashaur performs the billing, the receivables, and runs the accounting department, and sometimes serves as Kay's secretary. Tr. 339. Ophelia Nunez works on accounts receivable, posts monies, prepares bills, prepares bank deposits, works on legal matters, and prepares summons and complaints. Tr. 340-341. Damon Crowley, Sr. performs secretarial work, sorts files, performs accounts receivable and collections work, and works on legals. Tr. 341. Ken Schultz, who until recently was the acting general manager or service manager for Southland, is now a lead technician who repairs radios. Id. Randy French is a technician. Tr. 342. The technicians also check and test repeaters that may have failed. Tr. 343.

Payment of Operating Expenses

46. Under Paragraph IV of the Management Agreement, Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations. WTB Ex. 39, P. 3. Similarly, under paragraph XIII of the agreement, Kay is responsible for paying all expenses associated with the operation of the stations. WTB Ex. 39, P. 6, Tr. 131.

47. Kay estimates that his total investment in equipment for the Management Agreement stations is about $97,500. Tr. 354. Kay cannot accurately estimate how much he has paid in operating expenses for the Management Agreement stations because he does not break out his expenses based upon who holds the underlying licenses. Tr. 351-352. For example, Kay pays one check for rent on Mount Lukens, and pays one electric bill for equipment used by stations licensed to him, Sobel, or other stations he manages. Tr. 352. Kay explained that one reason he functions efficiently is that he cuts down "on a lot of extraneous and unnecessary bookkeeping to keep it simple." Tr. 355.

Receipt of Monies and Profit

48. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account, which is the same bank account that the revenues from the operation of Kay's owned stations are deposited. Tr. 348. Pursuant to the management agreement, if any station's monthly revenue exceeds $600 a month, Sobel is entitled to fifty percent of the excess revenue. WTB Ex. 39, P. 4. The revenue from four of the fifteen Management Agreement